STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 27-92:

MONTANA DISTRICT COUNCIL OF LABORERS, Complainant, vs. CITY OF HAMILTON, Defendant.	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

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I. INTRODUCTION

A formal hearing in the above-captioned matter was conducted by telephone on February 3, 1993. The hearing was conducted under authority of Section 39-31-406, MCA and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, MCA.

Complainant, Montana District Council of Laborers, was represented by Karl Englund, Attorney at Law, Missoula, Montana. Defendant, City of Hamilton, was represented by Don K. Klepper, The Klepper Company, Missoula, Montana. Witnesses included Charles G. Lambert, Jr., Hamilton city employee; David A. Trihey, Hamilton city employee; Russell Feister, Superintendent,

Streets and Parks Departments, City of Hamilton; and, Don Williamson, Administrative Assistant, City of Hamilton.

Subsequent to the hearing, the parties submitted initial and reply post-hearing briefs.

II. ISSUE

The issue in this matter is to determine whether Defendant has violated Section 39-31-401(1), (3), and (4), MCA. More specifically, Complainant alleges that Defendant demonstrated its anti-union animus by failing to hire more experienced former seasonal employees who had been active and vocal in their support of Complainant's organizing efforts and additionally alleged that Defendant had unilaterally changed working conditions of employees in the bargaining unit without bargaining with Complainant.

III. BACKGROUND

On June 3, 1991, Complainant filed a Petition for New Unit Determination and Election with this Board which was accompanied by a sufficient showing of interest. On June 30, 1991, Defendant filed a counter-petition disagreeing with the composition of the bargaining unit as proposed by Complainant. A Hearing Examiner of this Board conducted a unit determination hearing on November 1, 1991. Complainant and Defendant were present and represented, sworn testimony was taken, and the

parties filed post-hearing briefs. On December 18, 1991, the Hearing Examiner issued findings of fact, conclusions of law, and recommended order defining an appropriate bargaining unit and recommending an election by secret ballot. The appropriate bargaining unit consisted of all part-time, seasonal, temporary, and full-time employees excluding management employees, confidential employees, law enforcement employees, and all other employees excluded by the Collective Bargaining Act for Public Employees. No exceptions were filed to the Hearing Examiner's recommended order. A secret mail ballot election was conducted and the ballots were counted on February 26, 1992. A majority of the eligible voters selected to be represented for collective bargaining purposes by Complainant. Since time of certification of Complainant as the exclusive bargaining agent, Complainant and Defendant have been involved in collective bargaining. At date of this hearing, a total collective bargaining agreement had not been reached.

IV. FINDINGS OF FACT

1. Charles G. Lambert, Jr. and David A. Trihey had been previously employed as seasonal employees by Defendant. Mr. Lambert had been employed in the Parks Department the 1991 summer season. Mr. Trihey had been employed the summer seasons

of 1989, 1990, and 1991, working in the Parks and Streets Departments.

2. Both Mr. Lambert and Mr. Trihey were hired by Russell Feister, Superintendent of the Streets and Parks Departments, and generally worked under his control and direction.

3. The position of "seasonal employee" held by Mr. Lambert and Mr. Trihey and the position of "street department superintendent" held by Mr. Feister were included in the collective bargaining unit.

4. The position of Mayor of the City of Hamilton retains the sole authority to hire city employees. The Mayor may, and has, granted the Administrative Assistant (currently Don Williamson) authorization to hire. Defendant's formal hiring procedures includes written applicants, reference checks, and interviews. Contrary to Defendant's formal hiring procedures, Mr. Feister has personally hired seasonal employees for both the Streets and Parks Departments from time to time during his tenure with Defendant. Mr. Feister's practice was to hire those individuals who had previously worked for Defendant believing any prior experience qualified them to be re-hired. Furthermore, Mr. Feister would sometimes verbally hire seasonal employees before such employee even filled out a formal job application.

5. Defendant did not reverse or nullify seasonal employee hirings made by Mr. Feister. Defendant did reprimand Mr. Feister for his unauthorized hirings including his failure to follow usual hiring procedures. Such reprimand occurred prior to any union organizational efforts.

6. Both Mr. Lambert and Mr. Trihey were active in their support for Complainant's organizational efforts and both did testify at the Unit Determination hiring conducted on November 1, 1991. Defendant was aware of Mr. Lambert's and Mr. Trihey's support of Complainant.

7. Both Mr. Lambert and Mr. Trihey submitted formal written applications to Defendant for the 1992 summer season. Neither Mr. Lambert nor Mr. Trihey were interviewed or hired for the single available seasonal position in the Parks Department. Defendant hired Elmer Hochholter for the single available seasonal position because of his work history, previous experience in maintaining baseball fields, and commendations and recommendations from local citizens. Mr. Lambert, specifically, was not rehired for the 1992 seasons in the Parks Department because of complaints about his work and his previous unilateral attempts of substantial wage increases.

8. At the time of Mr. Lambert's and Mr. Trihey's non-hiring for the 1992 season no collective bargaining agreement

had be reached between Complainant and Defendant. A proposal had been tentatively agreed to during contract negotiations that provided employees with six months or more of continuous service would enjoy seniority rights for reductions in force, recall rights, consideration for promotion, and transfer. Neither Mr. Lambert nor Mr. Trihey had attained six months of continuous service.

9. On or about the first week of May 1992, Defendant modified its procedures on the reporting of annual leave and sick leave usage for all employees. Basically, the new procedures provided that all employees would make timely written requests on provided forms to use available annual leave. Such requests would be approved by the immediate supervisor and forwarded to Defendant's administration for final approval. The new policy additionally provided that all employees should call their immediate supervisor and/or the administration "...as soon as possible after 8:00 a.m." if reporting sick for the day.

Prior to the policy changes in annual leave and sick leave, annual leave requests were handled by the immediate supervisor with no formal procedures to involve Defendant's administration. Absences due to sick leave were reported to the immediate supervisor.

Neither the policy change regarding annual leave or sick leave affected in any way the number of leave credits earned by employees, the accrual of such leave credits, or the use of such credits.

V. DISCUSSION

The basic element of this case is whether Defendant's actions of failing to hire former seasonal employees and modifying annual leave/sick leave policies was motivated by anti-union animus.

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedence as guidelines interpreting the Montana Collective Bargaining for Public Employees Act as the State Act is so similar to the Federal Labor Management Relations Act, **State ex rel Board of Personnel Appeals v. District Court**, 183 Mont. 223 (1979), 598 P.2d 1117, 103 LRRM 2297; **Teamsters Local No. 445 v. State ex rel Board of Personnel Appeals v. District Court**, 183 Mont. 223 (179), 598 P.2d 1117, 103 LRRM 2297; **Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals**, 195 Mont. 272 (1981) 635 P.2d 1310, 110 LRRM 2012; **City of Great Falls v. Young (III)**, 686 P.2d 185 (1984) 199 LRRM 2682.

It is well established that it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization by means of employment discrimination. **Radio Officers v. NLRB (A. H. Ball Steamship Co.)**, 347 US 17, 33 LRRM 2417 (1954). However, not all discrimination is unlawful, **Radio Officers v. NLRB**, supra:

> The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Most claims involving employment discrimination arise out of employer decisions of which individuals are hired or fired. Such decisions by the employer are not unfair labor practices if such actions are motivated by legitimate and substantial business reasons and not desire to penalize or reward employees for union activity. **Laidlaw Corp.**, 171 NLRB 1366, 68 LRRM 1252 (1968) enforced, 414 F2d 99, 71 LRRM 3054 (CA 7, 1969), cert. denied, 397 US 920, 73 LRRM 2537 (1970). The National Labor Relations Board (NLRB) developed a "rule" or "test" to address such allegations of employment discrimination motivated by union animus in its 1980 Wright Line case. **Wright Line**, **Wright Line**

Div., 251 NLRB 1083, 105 LRRM 1169 (1980), enforced, 662 F2d 899, 108 LRRM 2513 (CA 1, 1981), cert. denied, 455 US 989, 109 LRRM 2779 (1982). (Also, see **Mt. Healthy City School District Board of Education v. Doyle**, 429 US 274 [1977]). Governed by the Wright Line Rule, in order to prove employment discrimination motivated by employer union animus, the affected employee must first prove the existence of protected activity, knowledge of that activity by the employer, and any degree of union animus motivation. Proof of these elements establishes a prima facie case and the burden then shifts to the employer. The employer may argue that prohibited motivations did not play any part in its actions. Should this argument fail to rebut the established prima facie case, then the employer must demonstrate that the same personnel action would have taken place for legitimate business reasons regardless of the employee's protected activity.

In this present case, there is no question that both employees, Mr. Lambert and Mr. Trihey, were engaged in protected activities and that Defendant was aware of the activities. Anti-union animus has been alleged by Complainant. Complainant's initial denial of anti-union animus failed. At hearing, however, Complainant showed it did not re-hire either Mr. Lambert or Mr. Trihey for the single Parks Department 1992

seasonal position for business reasons. Another individual was hired for the position who had previous experience in the parks area, had been applauded for his work performance and dedication, and had the support of local citizens. Neither Mr. Lambert nor Mr. Trihey had property interest in the seasonal position – no existing collective bargaining agreement, policy, or rule provided for previous seasonal employees to have claim or rights to future seasonal positions. Complainant's arguments are convincing that the personnel action taken would have occurred regardless of Mr. Lambert's and Mr. Trihey's union activity.

Secondarily, Complainant alleges that Defendant's actions of modifying rules and policies concerning annual leave and sick leave was an unfair labor practice. Normally, unilateral changes by an employer during the course of a collective bargaining relationship concerning mandatory subjects of bargaining are regarded as per se refusals bargain in good faith. **NLRB v. Katz**, 369 US 736, 50 LRRM 2177 (1962). In this matter, however, Defendant did not alter the "benefits" of annual leave or sick leave. Such benefits are set out in Sections 2-18-611 and 2_18_618, MCA respectfully. More specifically, Complainant argues the procedure for approval to use annual leave by an employee was modified unilaterally. On

or about May 1992, annual leave request/approval procedures were changed to include final approval by Defendant's administration. With respect to Section 2-18-616 MCA which provides, "The dates when employees' annual vacation leaves shall be granted shall be determined by agreement between each employee and his employing agency with regard to the best interests of the state, any county or city thereof as well as the best interests of each employee", and in regards to Section 39-31-303 MCA, Management rights of public employers, it is arguable whether a procedure for final approval of a vacation request of a public employee is a mandatory subject of bargaining. Defendant's argument of maintaining "management rights" is convincing.

VI. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in these matters pursuant to Section 39-31-405 et seq., MCA.

2. Defendant, City of Hamilton, did not violate Sections 39-31-401(1), (3), and (4) MCA.

VII. RECOMMENDED ORDER

Unfair Labor Practice Charge No. 27-92 is **DISMISSED.**

DATED this _____ day of July, 1993.

Stan Gerke
Hearing Examiner

SPECIAL NOTICE

In accordance with Board's Rule ARM 24.25.107(2), the above RECOMMENDED ORDER shall become the FINAL ORDER of this board unless written exceptions are filed within twenty (20) days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the Parties

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this _____ day of July, 1993.

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